(3)

No. 04-1213

Supreme Court, U.S.
FILED
APR 18 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CONSTRUCTION LABORERS PENSION TRUST FOR SOUTHERN CALIFORNIA,

Petitioner,

v.

EIJINIO BANUELOS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

JOHN S. MILLER, JR.*
CHARLES E. NONEMAN
COX, CASTLE & NICHOLSON LLP
2049 Century Park East,
28th Floor
Los Angeles, CA 90067-3284
Telephone: (310) 277-4222
Facsimile: (310) 277-7889

Counsel for Petitioner, Construction Laborers Pension Trust For Southern California

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

THE OPPOSITION TO THE PETITION FOR CERTIORARI DEMONSTRATES THE NEED FOR THE PETITION TO BE GRANTED AND FOR THIS COURT TO PROVIDE GUIDANCE TO THE COURTS BELOW CONCERNING WHEN FACTUAL DISPUTES SHOULD BE REMANDED TO THE ADMINISTRATIVE REVIEW PROCESS, WHEN THEY SHOULD BE RESOLVED BY EVIDENTIARY PROCEEDINGS IN THE DISTRICT COURTS, AND WHETHER, WHEN THE FACTUAL RECORD IS DEMONSTRABLY INCOMPLETE, THE COURTS HAVE JURISDICTION TO DECLINE REMAND, EXCLUDE EVIDENCE AND AWARD BENEFITS NEVER PROMISED OR ADOPTED BY THE BENEFIT PLAN 1

THE "STATEMENT OF THE CASE" AND "CLARIFICATION OF THE RECORD" SECTIONS OF BANUELOS' OPPOSITION TO THE TRUST'S PETITION MISSTATE AND MISCHARACTERIZE THE ACTUAL RECORD BELOW; THE COURTS SHOULD BE REQUIRED TO RESOLVE THESE TYPES OF FACTUAL AND INTERPRETIVE DISPUTES AND TO FIND THE TRUE FACTS THROUGH REMAND OR EVIDENTIARY PROCEEDINGS BEFORE A BENEFIT CLAIM DETERMINATION IS UPHELD OR DENIED 1

CONTRARY TO SECTION I, A OF THE OPPOSITION, THE SUPREME COURT ROUTINELY RESOLVES DIFFERENCES BETWEEN THE CIRCUIT COURTS WITH RESPECT TO FEDERAL COURT PROCEDURE 5

TABLE OF CONTENTS – Continued

Page

SECTION I, B OF THE OPPOSITION ASSERTING THE NINTH CIRCUIT'S DECISION COMPORTS WITH ERISA AND WITH DEPARTMENT OF LABOR CLAIMS PROCESSING REGULATIONS, MISCHARACTERIZES THE FACTS AND SUGGESTS THAT ERISA CONTAINS A "GOTCHA" STANDARD OF REVIEW THAT PERMITS MONETARY DAMAGES TO BE IMPOSED UPON A PLAN THAT MAKES A MISTAKE IN ATTEMPTING TO PROVIDE A "FULL AND FAIR REVIEW" OF A BENEFIT CLAIM 8

SECTION II OF THE OPPOSITION ASSERTING ERISA ENTITLES A PARTICIPANT TO RELY ON AN UNAUTHENTICATED PLAN DOCUMENT DEMONSTRATES THE IMPORTANCE OF THIS COURT GRANTING REVIEW TO ADDRESS WHEN REMAND OR THE CONSIDERATION OF NEW EVIDENCE IS APPROPRIATE AND REQUIRED UNDER ERISA AND THE DEPARTMENT OF LABOR CLAIMS PROCESSING REGULATIONS 9

CONCLUSION: THE TRUST'S PETITION SHOULD BE GRANTED 10

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986) 5

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) 5

Chemetall GMBH v. ZR Energy, Inc., 320 F.3d 714 (7th Cir. 2003) 7

Johnson v. Sawyer, 120 F.3d 1307 (5th Cir. 1997) 7

Lin v. United Parcel Service, 254 F.3d 1281 (11th Cir. 2001) 4

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986) 5

Murphy Brothers v. Michetti Pipe Stringing, Inc., 526 U.S. 342, 119 S.Ct. 1322, 143 L. Ed. 2d 448 (1999) 5

Ortega-Rodriguez v. United States, 507 U.S. 234, 113 S.Ct. 1199, 122 L. Ed. 2d 581 (1993) 6

Pahuta v. Massey-Ferguson, Inc., 170 F.3d 125 (2d Cir. 1999) 7

Pennbarr Corp. v. Insurance Company of North America, 976 F.2d 145 (3d Cir. 1992) 7

Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L. Ed. 2d 435 (1985) 6

Weisgram v. Marley Co., 528 U.S. 440, 120 S.Ct. 1011, 145 L. Ed. 2d 958 (2000) 5

THE OPPOSITION TO THE PETITION FOR CERTIORARI DEMONSTRATES THE NEED FOR THE PETITION TO BE GRANTED AND FOR THIS COURT TO PROVIDE GUIDANCE TO THE COURTS BELOW CONCERNING WHEN FACTUAL DISPUTES SHOULD BE REMANDED TO THE ADMINISTRATIVE REVIEW PROCESS, WHEN THEY SHOULD BE RESOLVED BY EVIDENTIARY PROCEEDINGS IN THE DISTRICT COURTS, AND WHETHER, WHEN THE FACTUAL RECORD IS DEMONSTRABLY INCOMPLETE, THE COURTS HAVE JURISDICTION TO DECLINE REMAND, EXCLUDE EVIDENCE AND AWARD BENEFITS NEVER PROMISED OR ADOPTED BY THE BENEFIT PLAN

Petitioner/defendant Construction Laborers Pension Trust for Southern California (the "Trust") is compelled to file this reply to the Brief in Opposition ("Opposition") of plaintiff/respondent Eijinio Banuelos ("Banuelos") in order to clarify material inaccuracies and irrelevancies. Ironically, these deficiencies illustrate the complexity of ERISA benefit plan benefits and eligibility requirements and the ease with which litigants can confuse busy courts if benefit claim disputes are not fully assessed factually by remand to the ERISA plan's administrative review process or by being subjected to evidentiary hearings before a district court. Thus, the excesses of the Opposition actually underscore the need for this Court to grant the Trust's Petition for Writ of Certiorari ("Petition").

THE "STATEMENT OF THE CASE" AND "CLARIFICATION OF THE RECORD" SECTIONS OF BANUELOS' OPPOSITION TO THE TRUST'S PETITION MISSTATE AND MISCHARACTERIZE THE ACTUAL RECORD BELOW; THE COURTS SHOULD BE REQUIRED TO RESOLVE THESE TYPES OF FACTUAL AND INTERPRETIVE DISPUTES AND TO FIND THE TRUE FACTS THROUGH REMAND OR EVIDENTIARY PROCEEDINGS BEFORE A BENEFIT CLAIM DETERMINATION IS UPHELD OR DENIED

The "Statement of the Case" and "Clarification of the Record" sections of the Opposition, Opp., pp. 1-5, misstate

the record, fail to distinguish which facts and contentions were presented to the Trust's claims review committee and which were submitted only to the district court, and insert contentions and alleged facts irrelevant to the issues presented in the Trust's Petition.[1] The effect of this, of course, is to suggest to this Court, that the Petition should not be granted, because the record below is not sufficiently clear to support the Court's review of the issues proposed. Nothing could be further from the truth. The record below presents a clean foundation for this Court's consideration of all three issues proposed.

Banuelos begins his "Statement of the Case" with an important admission. He states that he only cited "section 4.07(e) of the pension plan verbatim . . . ." Opposition, p. 1. He does not allege that the lawyer's working document, the so-called "1994 Plan" attached as Exhibit 1 to the Complaint and from which he took the language of 4.07(e) was ever submitted to the Trust.[2] However, Banuelos materially misstates the record in asserting that the pension department manager "cited the section in question as the basis of the appeal committee's denial."

The letter denying Banuelos' appeal did not quote or refer to section 4.07(e). Rather, the Trust's denial letter

---

[1] For example, Banuelos asserts that he has 16,000 hours of service over 25 years and is vested in the Trust but is unable to draw his pension because of particular plan requirements. While irrelevant to the legal issues here, these are sympathetic allegations. Proper context (which is beyond the scope of consideration at this stage of the review), however, would demonstrate that there are numerous explanations for this result that are rational, lawful under ERISA and fair for Banuelos, the other participants in the Trust, his Union and the employers who contributed to the Trust then and now.

[2] From the inception of the district court action – when Banuelos first revealed the so-called 1994 Plan by attaching it as Exhibit 1 to his complaint – the Trust has objected to the authenticity of that document. In the Trust's claims review process, Banuelos' counsel merely quoted the text of section 4.07(e) from that document in a letter to argue that Banuelos was entitled to pension benefits. At all times, the Trust asserted that section 4.07(e) of the document was never adopted by the Trustees as a part of the Pension Plan of the Trust.

referred expressly to Amendment No. 93-1-P, the duly adopted Amendment No. 93-1-P that contained no section 4.07(e). The initial draft of the amendment did have a section 4.07(e) that was removed from the second draft that was adopted by the Trust. Through a series of mistakes, this never-adopted section 4.07(e) was, however, included in co-counsel's working document (which also included the text of the duly adopted 93-1-P) attached to Banuelos' complaint. This working document was never requested by Banuelos. It was never furnished to Banuelos. It was given to Mr. Richard Weinstock ("Weinstock") by the Trust's pension department supervisor in another action not involving Banuelos and without the knowledge or authorization of the Trust (whose Trustees were unaware the lawyer's working document even existed).

It is significant that, at the time Weinstock was provided with a copy of co-counsel's working document in the non-Banuelos case in 1998, he was also provided with the Pension Plan contained in the Summary Plan Description booklet and with *all amendments* to the Pension Plan from 1986 through 1997. Opposition, p. 4. Weinstock later began to represent Banuelos. He did not attach any of these other documents to Banuelos' complaint or submit any of the amendments to the Trust's Pension Appeals Committee in support of his appeal on behalf of Banuelos.

Banuelos asserts he was "forced to defend" a "complicated reformation action" suggesting that this is an issue that the courts should not have to reach in a benefit denial case. Opposition, p. 2. He was not "forced to defend" such a case. He elected to assert in his complaint that he was entitled to benefits pursuant to an exhibit attached to the complaint. The Trust responded that this exhibit to the complaint, the lawyer's working document, was not the Trust's Pension Plan, and specifically that the Trust's Plan did not contain the five-year vesting provision appearing in Exhibit 1 to the complaint. The district court agreed. Banuelos was represented by experienced counsel at trial and throughout the proceedings. Weinstock, who claimed to be an experienced ERISA attorney in his subsequent

attorney's fee application filed with the district court, was not "ill-suited" to represent his client.

Similarly, Banuelos' assertion that he never received a full-blown trial on the merits of his claim to a pension is fantasy. Opposition, p. 6. The district court did not limit the trial to "matters concerning Trust's mistakes." The pre-trial conference order identified numerous claims and affirmative defenses which would be the subject of trial, only one of which was the issue of mistake. Banuelos was afforded the *opportunity* to try his case in front of the district court; he elected not to, by calling no witnesses, and confining his case only to the documentary evidence in Banuelos' pension application file.

Contrary to his contention, Banuelos did "abandon" his appeal of the trial court's judgment. Opposition, p. 3, note 2. He relinquished all ability to challenge on appeal the trial proceedings in the district court, because he expressly limited his appeal to the issue of the propriety of the district court's ruling on his motion for summary judgment. See Petition, note 1.[3] On appeal, Banuelos cannot challenge the district court's consideration of evidence outside the administrative record *at trial* because (1) Banuelos did not order the trial transcript (and it cannot, therefore, be determined whether Banuelos properly preserved this evidentiary issue for appeal) and (2) Banuelos specifically waived his right to challenge the trial proceedings on appeal. Thus, whether the Ninth Circuit properly addressed the merits of the district court's ruling on Banuelos' motion for summary judgment after a full trial on the merits is outcome determinative as a consequence of Banuelos' counsel's actions and inactions.

The Trust did not "fail to quote" to this Court "its version of the language of Section 4.07(e)." Opposition, p. 5. There was no section 4.07(e) in the Plan at the time

---

[3] *Cf. Lin v. United Parcel Service*, 254 F.3d 1281, 1283 n.2 (11th Cir. 2001) (appellant lost ability to challenge district court's Findings of Fact and Conclusions of Law because she limited her appeal only to the argument that her summary judgment should have been granted).

in question; the section 4.07(e) that was in the first version of Amendment No. 93-1-P was never adopted. The language of Amendment No. 93-1-P that was duly adopted by the Trustees, which amended the Plan definition of normal retirement age, did not add any section 4.07(e) to the Plan.

Finally, Banuelos' suggestion that he somehow "relied" on the 1994 Plan is utterly without merit. Opposition, p. 10. Banuelos stopped working in the construction industry in 1991, and his rights under the Plan were fixed at that time. The lawyer's working document to which the Court of Appeals referred as the so-called "1994 Plan" could obviously not even have existed until 1994. It was never provided to Banuelos. He never asked for it. It was given to Weinstock in an unrelated action not involving Banuelos and, even then, not until 1998 (when it was provided along with an actual copy of the plan with all amendments in separate form). Thus, Banuelos did not act or fail to act to his detriment based on anything contained in the "1994 Plan."

CONTRARY TO SECTION I, A OF THE OPPOSITION, THE SUPREME COURT ROUTINELY RESOLVES DIFFERENCES BETWEEN THE CIRCUIT COURTS WITH RESPECT TO FEDERAL COURT PROCEDURE

Contrary to Banuelos' assertion (Opposition, p. 6), this Court, of course, routinely accepts cases involving federal court procedure, many of which involve the resolution of differences among the circuits. *See e.g., Weisgram v. Marley Co.*, 528 U.S. 440, 120 S.Ct. 1011, 145 L. Ed. 2d 958 (2000); *Murphy Brothers v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 119 S.Ct. 1322, 143 L. Ed. 2d 448 (1999) (conflict among circuits); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L. Ed. 2d 265 (1986) (conflict among circuits); *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S.Ct. 2505, 91 L. Ed. 2d 202 (1986) (conflict among circuits); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L. Ed. 2d 538 (1986).

The two cases cited by Banuelos for the proposition that the Supreme Court will not intervene to resolve differences between the circuits regarding the interpretation of procedural rules are wholly off-point and distinguishable. Both cases deal with the issue of the authority of the individual Courts of Appeals to exercise supervisory powers by the adoption of procedural "local rules" governing the management of litigation. In *Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466, 88 L. Ed. 2d 435 (1985), this Court held that a Court of Appeals (in this case, the Sixth Circuit) may, as part of the exercise of its supervisory powers, adopt a rule conditioning appeal, when taken from a district court judgment that adopts a magistrate's recommendation, upon the filing of objections with the district court identifying those issues on which further review is desired.[4] *Thomas* noted, for example, that differences between Circuits in filing fees would not create a conflict to be resolved by this Court. *Id.* at 147, 157 (Stevens, J., dissenting), 106 S.Ct. 471, 476. In *Ortega-Rodriguez v. United States*, 507 U.S. 234, 113 S.Ct. 1199, 122 L. Ed. 2d 581 (1993), the Eleventh Circuit adopted a rule (in its supervisory capacity) mandating the dismissal of a defendant's appeal when the defendant escaped custody prior to the appeal, even if the defendant was recaptured prior to the appeal. This Court invalidated the Eleventh Circuit's mandatory rule on the grounds that it might well lack the kind of connection to the appellate process that would justify the sanction of dismissal. This Court held that there need not be uniformity among the Circuits' fugitive dismissal rules so long as each Circuit's rule satisfied "the threshold reasonableness requirement." *Id.* at 251 n. 24, 119 S.Ct. at 1211 n. 24. The Courts of Appeals' exercise of rule-making as an aspect of their supervisory powers is to

---

[4] In *Thomas v. Arn*, this Court noted that the Sixth Circuit's rule requiring the filing of objections to the Magistrate's report was not jurisdictional. As noted in the Petition, several of the Courts of Appeal have held that they have *no jurisdiction* to consider an appeal from the denial of a motion for summary judgment once there has been a trial on the merits.

be distinguished from whether the federal courts have the authority to review denied summary judgment motions after a full trial on the merits. The latter issue is one of substantial importance to the overall administration of justice in civil lawsuits.

Petitioner asserts that "almost every other circuit that has ruled on the matter" recognizes exceptions to the general rule that a denied summary judgment motion is not subject to review after a case has been fully tried on the merits. Opposition, p. 6. This statement is simply not true, and the cases cited by petitioner do not support the statement. Indeed, *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-20 (7th Cir. 2003), notes the *differences* between the Seventh Circuit and the Ninth Circuit (which have adopted the "issue of law" exception), on the one hand, and the Fourth Circuit (which recognizes no exception), on the other hand.[5] *Pahuta v. Massey-Ferguson, Inc.*, 170 F.3d 125 (2d Cir. 1999), has nothing to do with the issue presented in the Petition. Footnote 4 of *Pahuta* discusses the exceptions to the rule of the *non-appealability* of an order denying a motion for summary judgment, not whether the denial may be reviewed following a final judgment rendered after a full trial on the merits. *Id.* at 131 n. 4. In *Johnson v. Sawyer*, 120 F.3d 1307, 1316 (5th Cir. 1997), the court *reaffirmed* the principle that orders denying summary judgment are not reviewable on appeal where final judgment adverse to the movant is rendered on the basis of a subsequent full trial on the merits. The *Johnson* court noted no exceptions.

Banuelos asks rhetorically whether this Court should adopt a "one size fits all" rule for the Circuit Courts? The

---

[5] *Chemetall* does note some cases (cases that were referenced in the Trust's Petition) where Courts of Appeal have reviewed a denied motion for summary judgment after a full trial on the merits. However, the propriety of review was simply never addressed. For example, in *Pennbarr Corp. v. Insurance Company of North America*, 976 F.2d 145, 149-50 (3d Cir. 1992), the Third Circuit reviewed the denial of a motion for summary judgment following a jury trial, but the court did so without considering the issue of whether it was appropriate to do so.

Trust submits the answer should be affirmative. No good reason exists for allowing the Ninth and Seventh Circuit Courts to review appeals of denied summary judgments after a full trial. Trial is favored; it has permitted full litigation of the facts and issues; it cannot be undone. A party whose motion for summary judgment was denied did not lose his right in proceeding to trial to challenge any substantive legal issues embedded in the earlier motion, provided the party takes the appropriate steps at trial to preserve the issues. To allow the Ninth and Seventh Circuit Courts of Appeals to turn back the hands of time, effectively voiding the trial altogether and re-addressing issues arising at the earlier summary judgment stage, is a waste of judicial resources, invites result-oriented jurisprudence, encourages litigation gamesmanship, all combining to undermine the integrity of the trial process.

SECTION I, B OF THE OPPOSITION ASSERTING THE NINTH CIRCUIT'S DECISION COMPORTS WITH ERISA AND WITH DEPARTMENT OF LABOR CLAIMS PROCESSING REGULATIONS, MISCHARACTERIZES THE FACTS AND SUGGESTS THAT ERISA CONTAINS A "GOTCHA" STANDARD OF REVIEW THAT PERMITS MONETARY DAMAGES TO BE IMPOSED UPON A PLAN THAT MAKES A MISTAKE IN ATTEMPTING TO PROVIDE A "FULL AND FAIR REVIEW" OF A BENEFIT CLAIM

Banuelos responds to Trust's Petition by contending that he did not receive a "full and fair review" of his benefit claim. He then asserts that, because "the Ninth Circuit merely reviewed the records applicable to Banuelos' claim and found that, based on those records, he was legally entitled to a pension," the Circuit's decision is consistent with ERISA and the Department of Labor's claims processing regulations. Opposition, p. 8. Since the Ninth Circuit's review of "records applicable to Banuelos' claim" was a review of records attached to the complaint and never provided to the Trust and since it excluded review of records the Trust sought to introduce or to

address in a remand of open issues to the Trust's administrative review committee, Banuelos is suggesting that this Court should allow the Ninth Circuit to create "gotcha" jurisdiction over ERISA employee benefit plans, awarding damages against a plan when the plan fails to anticipate and address in its own administrative record all issues which a benefit plan claimant is likely to assert in the district court. For a plan failing to do so, Banuelos would have the district court empowered to deny remand of any open questions to a plan's administrative review committee and, instead, to enter judgment on the plaintiff's claim without any further evidence being accepted from the benefit plan.

SECTION II OF THE OPPOSITION ASSERTING ERISA ENTITLES A PARTICIPANT TO RELY ON AN UNAUTHENTICATED PLAN DOCUMENT DEMONSTRATES THE IMPORTANCE OF THIS COURT GRANTING REVIEW TO ADDRESS WHEN REMAND OR THE CONSIDERATION OF NEW EVIDENCE IS APPROPRIATE AND REQUIRED UNDER ERISA AND THE DEPARTMENT OF LABOR CLAIMS PROCESSING REGULATIONS

Banuelos asserts in his Opposition that "remand is inappropriate where there are no issues left to be resolved by the pension administrators because the facts can lead to only one legal conclusion." Opposition, p. 8 (citation omitted). He proposes the Ninth Circuit decision below be upheld in its application of this rule in this case where the so-called "facts" are the document Banuelos attached to his complaint but never submitted to the Trust for consideration during the claims review process and which was expressly found by the district court following a two-day trial not to be the pension plan of the Trust. Banuelos, on this record, asserts that no factual issue exists in the case below, because the Trust's documents "speak for themselves." Opposition, p. 9. He then alleges entitlement to collect a never-authorized benefit from the Trust because

the "policy of ERISA, mandated by Congress" entitles him as an employee to determine what his options are by studying "the Plan's written documents" (Opp., p. 9), a document that, in this case, does contain a mistake, but a document that Banuelos did not ask the Trust to give him, that the Trust did not give him, and that his attorney gave to him (at a time when his attorney knew presumptively that the Trust contended its pension plan and its amendments did not contain the provision upon which Banuelos relies).

CONCLUSION

Efficient, knowledgeable, full and fair claims processing is of great importance to the employee benefit plan community. This is evidenced by the Brief *Amicus Curiae* filed by the National Coordinating Committee for Multiemployer Plans in support of the Trust's Petition for Panel Rehearing and/or Suggestion for Rehearing *En Banc* filed with the Ninth Circuit on behalf of three hundred eleven multiemployer pension plans and raising the same concerns the Trust has set forth in its Petition. The Petition should be granted.

Respectfully submitted,

JOHN S. MILLER, JR.
CHARLES E. NONEMAN
COX, CASTLE & NICHOLSON LLP
2049 Century Park East
Twenty-Eighth Floor
Los Angeles, California 90067-3284
(310) 277-4222